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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 922.

HARRY J. STADIN,
Petitioner,

vs.

UNION ELECTRIC COMPANY et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

Of Respondent Union Electric Company in Opposition.

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 309 F. 2d 912 and is set out in full in Appendix A, *infra*. The order of the District Court is unreported and is set out in a separate appendix to the Petition for Writ of Certiorari at page 23.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 15, 1962 (Petitioner's separate appendix at page 22). A petition for rehearing was denied on December 26, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Under the facts of this case, is there any showing from the pleadings or otherwise that petitioner intervenor is or may be inadequately represented or that he is or may be bound by the judgment in the main action as required by Rule 24 (a) (2) of the Federal Rules of Civil Procedure?

2. Under the facts of this case, is there any showing from the pleadings or otherwise that petitioner intervenor has demanded that suit be filed and that Union Electric has refused to do so?

3. Under the facts of this case, is there any showing from the pleadings or otherwise that management of Union Electric has been guilty of a breach of trust or conflict of interest?

STATUTES AND RULES INVOLVED.

Rule 24 (a) (2) of the Federal Rules of Civil Procedure provides as follows:

> "Upon timely application any one shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Rule 23 (b) of the Federal Rules of Civil Procedure provides as follows:

"(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

STATEMENT.

Petitioner seeks review of the judgment of the Court of Appeals for the Eighth Circuit affirming the District Court's order denying petitioner's motion for leave to intervene in two antitrust cases pending in the District Court. That motion sought leave to intervene both as a matter of right under Rule 24 (a) (2) of the Federal Rules of Civil Procedure and as a matter of discretion under Rule 24 (b) (2). Petitioner now seeks review of only one of the two original cases and only on the question of intervention as a matter of right. There was no printed record in the Court of Appeals, the case having been heard on the original papers filed in the District Court.

On December 26, 1961, Union Electric Company (hereinafter referred to as Union Electric) filed Cause No. 61 C 407 in the United States District Court for the Eastern District of Missouri, Eastern Division, against Westinghouse Electric Corporation and General Electric Company for treble damages under the antitrust laws of the United States by reason of overcharges in the sale by the named defendants to Union Electric of two turbine generator units. The complaint alleges a conspiracy to fix the prices of turbine generator units in violation of Section 1 of the Sherman Act (15 U. S. C., § 1). The complaint further alleges that the same conspiracy was subject to civil and criminal actions brought by the United States of America against the named defendants and the named co-conspirators; that the defendants subsequently pleaded guilty in the criminal action and a judgment of conviction was entered thereon; and that the civil action is still pending in the United States District Court for the Eastern District of Pennsylvania (Paragraphs 8, 9 and 12 of the complaint). Union Electric alleges that it has been injured as a result of the named conspiracy in an amount

equal to the difference between the prices charged Union Electric for two turbine generator units and the price which Union Electric would have paid for said units if the price had been established by free and open competition and had not been controlled by the conspiracy (Paragraphs 14 and 15 of the complaint).

On February 20, 1962, petitioner, Harry J. Stadin, filed a motion for leave to intervene as a plaintiff in the case under Rule 24 (a) (2) and 24 (b) (2) of the Federal Rules of Civil Procedure. Attached to the motion for leave to intervene was a pleading, styled an "Intervenor's Complaint". Virtually identical motions for leave to intervene and intervenor's complaints were filed by petitioner in seven other antitrust cases filed by Union Electric in other categories of equipment and against various suppliers of electrical equipment.

The intervening complaint contains the following allegations: Petitioner is the owner of 43 shares of 11,402,622 shares of Union Electric common stock outstanding. There are also 533,595 shares of voting preferred stock outstanding. On February 16, 1961, petitioner submitted to Union Electric's directors for their action and action by Union Electric's stockholders at their April 20, 1961, annual meeting the following proposal:

> "Resolved, That the Company take appropriate steps in pursuit of all its rights, including its right to triple damages under the Clayton Act, against any of those of its electrical equipment suppliers who were recently convicted of anti-trust law violations by U. S. District Judge J. Cullen Ganey, in Philadelphia, so as to achieve for the Company reimbursement of the difference between the illegal price it paid such suppliers for electrical equipment sold to it, and the fair market value of such equipment at the time it was bought."

The directors of Union Electric are alleged to have refused to include the proposal in proxy material they sent to Union Electric's stockholders, assigning as their reason for such refusal that the proposal was not a proper subject for action by stockholders under Missouri law (Paragraphs 1 and 2 of intervening complaint).

Petitioner goes on to allege in his intervening complaint that he submitted his resolution from the floor at the annual stockholders' meeting but members of the Board of Directors spoke out against the adoption of the proposal and it was defeated by a vote of 10,325,766 shares to 1,825 shares. Thereafter, petitioner advised the President of Union Electric that unless Union Electric undertook to pursue its legal rights against the price-fixers, petitioner himself would seek a legal remedy on its behalf. Subsequently, Union Electric did file antitrust suits for damages sustained by it by reason of conspiracies involving purchases of equipment in the following categories: (1) turbine generators; (2) meters; (3) power switchgear assemblies; (4) circuit breakers; (5) power transformers; (6) condensers; (7) instrument transformers; and (8) distribution transformers. Union Electric has not filed suit for damages allegedly sustained by it by reason of alleged purchases in the following categories of equipment: (1) power switching equipment; (2) low voltage power circuit breakers; (3) lightning arresters, cutouts and arrester-cutout combinations; (4) open fuse cutouts and accessories; (5) bushings and bushing accessories; (6) isolated phase buses and isolated phase bus structures; (7) Navy and marine switchgears; (8) network transformers; (9) low voltage distribution equipment; (10) power capacitors; and (11) insulators (See paragraphs 4, 5, 6 and 7 of the intervening complaints).

Petitioner further alleges that indictments were returned against the defendants named in the original suits regard-

ing the eleven categories of equipment not sued on; that defendants pleaded guilty to the indictments; and that Union Electric sustained substantial damages by reason of purchases by it of equipment in these categories. Petitioner also incorporates by reference in his intervening complaint the allegations made by Union Electric in its original turbine generator complaint (Paragraphs 6 and 8).

Petitioner states in his intervening complaint that by voting against his resolution as set out above, the directors of Union Electric thereby refused to bring suit for damages in the eleven categories of equipment named by petitioner and that the vote against his resolution was a condonation of the conspiratorial acts of defendants. It is further alleged that "such condonation and refusal on the part of Union's directors was not in good faith, amounted to an unreasonable, capricious and arbitrary exercise of business judgment and constituted a breach of trust on the part of said directors toward Union, toward intervenor, and toward the stockholders who voted with intervenor." The complaint also contains allegations that "representation by Union of intervenor's interest herein is or may be inadequate, and intervenor is or may be bound by a judgment in the main action herein"; that Union Electric's principal attorney in the main action is "not on friendly terms with intervenor"; and that "intervenor's claim and the main action herein have questions of law and fact in common" (Paragraphs 14 and 15 of the intervening complaints).

The intervening complaint concludes by asking judgment on behalf of Union Electric for three-fold the damages allegedly sustained by Union Electric by reason of its purchases in the eleven categories of equipment not sued upon by Union Electric. No relief is sought for damages sustained by Union Electric by reason of its purchases of turbine generators or by reason of its purchases

in any of the other categories of equipment for which Union Electric has filed suit.

Affidavits were filed both by petitioner and by Union Electric. Two affidavits signed by petitioner were submitted to the Court. Petitioner's first affidavit stated that after he offered his proposed resolution at the annual meeting of Union Electric's stockholders on April 20, 1961, some of the stockholders opposed the resolution and stated that the filing of suit would be a waste of money. The other affidavit stated that previously filed affidavits submitted by Union Electric contained hearsay evidence.

Union Electric submitted two affidavits by Mr. John A. Woodbridge, and one affidavit each by Mr. A. H. Schettler and Mr. Thomas L. Croft. Mr. Woodbridge, Vice President and General Counsel of Union Electric, stated in his first affidavit that he voted against Mr. Stadin's resolution because it was not a proper subject for action by stockholders since control of litigation and the decision whether or not to litigate is in the directors under Missouri law. He also pointed out that in regard to the question of including petitioner's proposal in the proxy statement, Union Electric was advised by the Securities and Exchange Commission that "it would not take any action if the management should omit the proposal from the proxy statement." He stated further that Union Electric has been studying for some time the purchases made by it of electrical equipment in order to determine whether it made any purchases of equipment in the various categories named in petitioner's intervening complaint and, if so, the extent of any overcharges for these purchases. Mr. Woodbridge's affidavit further stated that no final decision has been made as to any of the categories for which Union Electric has not filed suit except as to one in which Union Electric made no purchases during the indictment period. He further stated that Union Electric

has adopted a policy of filing separate suits in each category of equipment in order to avoid confusion, complexities of litigation and delays in an adjudication of the rights of Union Electric with regard to each category (Paragraphs 2, 3 and 5 of Mr. Woodbridge's first affidavit). Mr. Woodbridge's other affidavit contained complete and accurate excerpts from the transcript of the annual meeting of the stockholders held on April 20, 1961, relating to the question of the antitrust suits.

The affidavit of Mr. A. H. Schettler, Executive Vice President of Union Electric, stated that there are approximately 64,400 common shareholders and 7,000 preferred shareholders of Union Electric stock. Mr. Schettler further stated that all decisions by management with regard to the bringing of antitrust suits have been and will continue to be the result of the independent judgment on the part of management and that such decisions will be made only after an adequate investigation of the facts and that such investigation is still continuing (Paragraphs 2 and 3 of the affidavit of Mr. Schettler).

The affidavit filed by Mr. Thomas L. Croft, one of the attorneys for Union Electric, stated that intervention on the part of petitioner would unduly delay and prejudice the adjudication of the rights of Union Electric. Mr. Croft stated that if claims in other categories of equipment were added to each of the original suits filed by Union Electric, each case would become very complex because purchases in other categories involve literally thousands of items of equipment as well as purchases from many corporations besides those named as defendants in each case and that this would necessitate adding parties defendant to the original causes of action. Moreover, intervention would enlarge many times the number of interrogatories, depositions, pre-trial motions and briefs and arguments thereon and this would in turn delay the date of trial of each cause

It is further stated by Mr. Croft that, at trial, intervention by petitioner would cause the production of additional documents, testimony of many additional witnesses and petitioner would be the source of additional questions, objections and motions which would tend to confuse the proceeding. Intervention by petitioner would, according to Mr. Croft, cause collateral and extrinsic issues to be injected into the main causes of action in each case.

In addition to the affidavits filed, petitioner was permitted to testify at the hearing on his motion for leave to intervene, which was held on April 6, 1962. At that hearing Mr. Stadin testified that the recitals contained in his verified intervening complaints and in his affidavit filed with the Court on April 5, 1962, were true.

On May 17, 1962, the District Court entered an order overruling in all particulars the motion of petitioner for leave to intervene. The Court's order also stated that the ruling of the Court involved a controlling question of law and granted petitioner permission to make application for appeal under the expediting provisions of Section 1292 (b) of 28 U. S. C., relating to non-final orders. Such an application was made by petitioner and was denied by the Court of Appeals on June 11, 1962, without prejudice to any rights which petitioner might otherwise have. **Harry J. Stadin v. Union Electric Co.**, Misc. No. 163, September Term, 1961, Eighth Circuit. Thereafter, petitioner perfected his right to appeal under the ordinary procedures applicable to final orders.

On appeal, the Court of Appeals affirmed the District Court's order insofar as it pertained to intervention as a matter of right and dismissed petitioner's appeal insofar as it related to permissive intervention. The Court held that under the well-pleaded facts contained in the intervening complaint and also on the basis of other undis-

puted facts contained in the affidavits submitted by petitioner and by Union Electric, there was no showing, as required by Rule 24 (a) (2), either that petitioner was or might be inadequately represented or that he was or might be bound by the judgment in the main action. The Court also held that, under the facts, petitioner had failed to show a demand by petitioner that suit be filed and a refusal by Union Electric, or that there was any breach of trust by Union Electric and that both are required before a derivative action can be brought.

ARGUMENT.

I.

The Decision Below Is Clearly Correct and Is Based Solely on the Inadequacy of Petitioner's Pleading and the Particular Facts of the Case.

The decision below is clearly correct and is based primarily on several separate and distinct insufficiencies in petitioner's intervening complaint. First, petitioner failed to allege any facts showing inadequacy of representation. More than that, his complaint bespeaks *adequacy* of representation since it does not seek any relief in the cause of action in which intervention is sought. Petitioner seeks relief and damages only in eleven other controversies for which suit has not yet been filed by Union Electric. Rule 24 of the Federal Rules plainly contemplates that the inadequacy of representation be in the case in which intervention is sought, not in one or more other cases which the intervenor thinks should be filed. Moreover, as the Court below pointed out, petitioner's pleading does not embrace any charges of collusion, adverse interest or nonfeasance as required by Rule 24. **Stadin v. Union Electric Co.**, 309 F. 2d 912, 919 (8th Cir., 1962), and cases there cited; see also 4 **Moore's Federal Practice**, Section 24.08, pages 38-39. Petitioner's allegation that one of the counsel of Union Electric is unfriendly to petitioner is patently insufficient, and the allegation in his complaint that his representation "is or may be inadequate" is a bare conclusion and insufficient as a matter of law. 4 **Moore's Federal Practice**, paragraph 24.14; **Pacific States Box & Basket Co. v. White**, 296 U. S. 176, 185 (1935); **Straus v. Foxworth**, 231 U. S. 162 (1913); **Billings Utility Co. v. Advisory Committee**, 135 F. 2d 108 (8th Cir., 1943); **Marranzano v. Riggs National Bank of Washington**, 184 F. 2d 349 (C. A. D. C., 1950); **Sabin v. Home Owners' Loan Corp.**, 151 F. 2d 541 (10th Cir., 1945).

Secondly, there has been no showing that petitioner would be bound by the judgment entered in the main action as required by Rule 24 (a) (2). **Sam Fox Publishing Co. v. United States**, 366 U. S. 683, 694 (1961). In fact, as pointed out by the Court of Appeals, petitioner does not even contend that he will be bound by the judgment; he contends only that a judgment in the main action will cause him "great difficulty" in prosecuting the other eleven separate and distinct cases which he seeks to add to the main suit. **Stadin v. Union Electric Co.**, 309 F. 2d 912, 918 (8th Cir., 1962). Under any criterion, the fact that petitioner may have great difficulty in another law suit if he is not permitted to intervene in the main case is not enough to meet the requirement of Rule 24 (a) (2) that he is or may be "bound" by a judgment entered in the main action.

Third, petitioner's intervening complaint is insufficient insofar as it attempts to comply with Rule 23 (b) pertaining to derivative actions. Contrary to Rule 23 (b), the complaint does not allege facts showing a demand on Union Electric that it file suit in the eleven categories of equipment which petitioner seeks to append to the main action. Rather, the only demand by petitioner was the resolution offered by petitioner that Union Electric take "appropriate steps" in pursuit of its legal rights; and it was after the defeat of this resolution that Union Electric did file eight lawsuits seeking treble damages from various electrical suppliers. Not only is it clear, as pointed out by the Court of Appeals (309 F. 2d at 921), that "appropriate steps" may not include the filing of a lawsuit and hence cannot be deemed a demand that Union Electric do so, but also even if the resolution can justifiably be called a demand, that demand was met when subsequent thereto Union Electric filed eight cases for violation of the antitrust laws.

Finally, even assuming for the sake of argument that there was a showing of demand and refusal, the intervening complaint is insufficient because it alleges no facts showing a breach of trust by the management of Union Electric in its decision not to sue, and the requirement of a breach of trust is clearly a condition precedent to the right to bring a derivative action. **United Coppers Securities Co. v. Amalgamated Copper Co.**, 244 U. S. 261, 264 (1917); **Ashwander v. Tennessee Valley Authority**, 297 U. S. 288, 319, 343 (1936); and see **Sam Fox Publishing Co. v. United States**, 366 U. S. 683, 689 (1961). There are no facts in the record in any way indicating a breach of trust. The best petitioner can do is make the unsupported allegation that there was such a breach. Such a conclusory allegation is clearly insufficient. 4 **Moore's Federal Practice**, paragraph 24.14; **Pacific States Box & Basket Co. v. White**, 296 U. S. 176, 185 (1935); **Straus v. Foxworth**, 231 U. S. 162 (1913); **Billings Utility Co. v. Advisory Committee**, 135 F. 2d 108 (8th Cir. 1943), **Marranzano v. Riggs National Bank of Washington**, 184 F. 2d 349 (C. A. D. C. 1950); **Sabin v. Home Owners' Loan Corp.**, 151 F. 2d 541 (10th Cir. 1945).

II.

The Decision Below Presents No Important Question of Federal Law and Does Not Conflict With Any Other Decisions of This Court or the Courts of Appeal.

There is no important federal issue involved in this case. The only question presented is the factual one of whether petitioner's intervening complaint is adequate to state grounds for intervention and for the bringing of a stockholder's derivative action. Such a factual type decision does not present any important question of federal law requiring review by this Court. A case of this kind must turn on its own precise facts and has little if any effect on any question of law. Petitioner is mistaken in

his contention that this case presents "an important sociological question" (Petition at page 4). On the contrary, the issues here are factual only; they are neither legal nor sociological.

Petitioner's assertion that the decision below is in conflict with the Third Circuit's decision in **Rogers v. American Can Company**, 305 F. 2d 297 (1962), is illusory. That case stands simply for the proposition that in a shareholder's derivative action for violation of the antitrust laws by the shareholder's corporation and others, there need be no showing of a breach of trust on the part of the management of the shareholder's corporation other than their participation in the illegal conspiracy. Here, Union Electric is not alleged to have been, and clearly was not, part of a conspiracy by the electrical suppliers. Absent participation, petitioner must allege a breach of trust in some other respect, but such an allegation is lacking in the intervening complaint. Thus the decision in **American Can** is not apposite here.

Petitioner's contention that the decision below conflicts with **International Mortgage & Investment Corp. v. Von Clemm**, 301 F. 2d 857 (2d Cir. 1962), and **Independent Refiners Assn et al. v. Standard Oil Company of New Jersey**, 304 F. 2d 387 (C. A. D. C. 1962), is equally without merit. The conflict allegedly consists in the fact that the courts in the above cases distinguished this Court's decision in **Sam Fox Publishing Co. v. United States**, 366 U. S. 683 (1961), on the facts, while the Court in the decision below followed **Sam Fox** and did not distinguish it; according to petitioner, a conflict was thereby created (Petition at pages 21-22). Manifestly, if the Courts in **Von Clemm** and **Standard Oil** should not have distinguished the **Sam Fox** case, it is those decisions, not the decision below, which should be reviewed by this Court. Moreover, the decisions in **Von Clemm** and **Standard Oil** are not in point and turn

upon their own facts. In **Von Clemm** the question of intervention turned, to a large extent, upon an interpretation of the Trading with the Enemy Act, and the **Standard Oil** decision involved the question whether certain oil refining companies could intervene in an action contesting the validity of an oil import regulation promulgated by the Secretary of the Interior. A reading of both decisions shows that they turned on their own facts, as did the decision below. The short of the matter is that the Court below found that petitioner's intervening complaint was factually insufficient for a number of reasons; that holding does not conflict with the decision of any other court.

CONCLUSION.

The decision below is clearly correct and involves merely a question of the factual sufficiency of a pleading. It involves no federal question of importance and does not conflict with any decisions by this Court or by the Courts of Appeal. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX A.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 17,104

Harry J. Stadin, Appellant,

v.

Union Electric Company, et al, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 15, 1962.]

Before SANBORN and BLACKMUN, Circuit Judges, and REGISTER, District Judge.

BLACKMUN, Circuit Judge.

This is an appeal arising out of the district court's denials of Harry J. Stadin's motions to intervene as a party plaintiff in two civil antitrust cases in which Union Electric Company is an original plaintiff.[1]

[1] The district court initially denied Stadin leave to intervene in the first of these cases by an order expressing the opinion required by 28 U.S.C. § 1292(b) as a condition of this court's discretionary allowance of an appeal from an order not otherwise appealable under that section. We denied Stadin permission to take that appeal but did so without prejudice to any rights he may otherwise have.

Thereafter the district court entered an order denying Stadin leave to intervene in the second case. By that same order, however, the court consolidated both cases for purposes of appeal and found that Stadin's claim was a shareholders' class claim for damages in addition to those sought by Union in the main actions and that the situation was thus one of multiple claims. It then made the express determination prescribed by Rule 54(b), F.R.Cv.P., as to no just reason for delay and entered judgment against Stadin. The appeal therefore is from the final decision in each case denying Stadin leave to intervene.

Union is a utility engaged in the business of generating and furnishing electricity. The defendants Westinghouse Electric Corporation, General Electric Company and Sangamo Electric Company are electrical equipment manufacturers. Stadin, the applicant for intervention, is a minority shareholder of Union.

The progenitors of these cases are judgments of conviction entered in February 1961 against these defendants and others in federal criminal antitrust proceedings in the United States District Court for the Eastern District of Pennsylvania. The offenses there charged, and to which the defendants pleaded either guilty or nolo contendere, had to do with conspiracy and price rigging in the sale of electrical equipment.

On December 26, 1961, Union instituted the first of the two present actions. It is brought under § 4 of the Clayton Act, 15 U.S.C. § 15, for a claimed violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and is against Westinghouse and General Electric. By it Union seeks threefold damages allegedly resulting from overcharges in the sales of turbine-generators to Union by the respective defendants. On January 31, 1962, Union and Missouri Power & Light Company and Missouri Edison Company, which also are utilities engaged in the business of generating and furnishing electricity, instituted the second action. This is brought under the same sections of the Clayton and Sherman Acts and is against Westinghouse, General Electric and Sangamo for threefold damages allegedly resulting from overcharges in sales by the respective defendants to the plaintiffs and their predecessors of watt-hour and rate-of-demand meters.

Stadin's motions to intervene followed in February and March. His motion in the second case is directed only to Union's count in that action. Stadin rests each motion on the grounds that Union's representation of his interest is or may be inadequate and that he is or may be bound by

a judgment in the action, within the meaning of Rule 24(a)(2),[2] F.R.Cv.P., having to do with intervention of right, and that his claims and Union's have questions of law and fact in common, within the meaning of Rule 24(b)(2),[3] having to do with permissive intervention.

As required by Rule 24(c), each of these motions is accompanied by a pleading. This is called an "Intervenor's Complaint". Each complaint incorporates by reference Union's own allegations. Each also contains certain allegations in common with Stadin's other complaint and additional allegations directed to the particular main action. The allegations are as follows:

a. Stadin owns 43 of Union's 11,402,622 common shares outstanding. There are also outstanding 533,595 voting preferred shares of Union.

b. In February 1961 Stadin submitted to Union's directors, for their action and for action by Union's shareholders at their annual meeting the following April, a proposed resolution[4] that Union "take appropriate steps"

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[2] Rule 24. "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *"

[3] Rule 24. "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[4] "*Resolved*, that the Company take appropriate steps in pursuit of all its legal rights, including its right to triple damages under the Clayton Act, against any of those of its electrical equipment suppliers who were recently convicted of anti-trust law violations by U. S. District Judge J. Cullen Ganey, in Philadelphia, so as to achieve for the Company reimbursement of the difference between the illegal price it paid such suppliers for electrical equipment sold to it, and the fair market value of such equipment at the time it was bought."

against its electrical equipment suppliers who had been convicted in the federal criminal actions in Pennsylvania.

c. Union's directors refused to include this proposal among the proxy material sent to Union's shareholders for the annual meeting. The reason they assigned for this refusal was that the proposal was not a proper subject for action by the shareholders under Missouri law.

d. Stadin himself then submitted the proposed resolution at the April meeting. Members of Union's board of directors spoke out against it and they and management's proxy agents voted against it. The resolution was defeated by a share vote of 10,325,766 to 1,825.

e. Four days later Stadin advised Union's president that unless Union undertook to pursue its legal rights against the price-fixers Stadin himself would seek legal remedy, on behalf of the company and of those who voted with him, in a shareholders' derivative suit or suits.

f. Although Union, since December 1961, has filed Clayton Act suits against various defendants for damages sustained through price-fixing of electrical equipment in eight different categories, including the two involved in the main actions here, it has not yet brought suit for damages resulting from purchases of equipment in eleven other categories with respect to which the defendants were similarly indicted and convicted in the Pennsylvania federal court on pleas of guilty or nolo contendere.

It is then alleged that Union's directors, by opposing Stadin's resolution, voted against the bringing of suits against the defendants; that the later institution of suits for certain categories of equipment did not constitute a retraction of their refusal to bring suit for the other equipment categories; that the directors have condoned the sale to Union of this other equipment at rigged prices; that this was not in good faith and was a breach of trust; and

that John A. Woodbridge, "Union's principal attorney in the main action", inadequately represents Stadin because he is one of the directors who "voted against bringing the main action", is "not on friendly terms with" Stadin, stands charged by Stadin with having made illegal profits in the purchase and sale of Union's stock rights in 1959, and has characterized that charge as malicious. Each complaint asserts on information and belief that Union sustained damages "running into the millions of dollars" because of the fixing of prices of electrical equipment not covered by the main actions.

The complaints conclude with prayers for judgment in favor of Union and against the defendants in amounts equal to threefold the damages sustained by Union in the sales to it of equipment in the categories other than those which Union's pending actions concern.

Union opposed Stadin's intervention by memorandum and three supporting affidavits. The latter are executed, respectively, by Union's executive vice-president; by Woodbridge, who is its vice-president and general counsel; and by one of Union's independent attorneys. These affidavits contain, among other things, statements that Union has 64,400 common shareholders and 7,000 preferred shareholders; that Union has been investigating purchases made by it from the suppliers against whom antitrust suits were instituted by the United States; that the indictments of the defendants related to twenty categories of equipment; that purchases in the categories not yet sued upon "involve literally thousands of items • • • and purchases from many corporations besides those named as defendants"; and that after the investigation has been completed Union's management, with advice of counsel, will decide whether suit should be brought as to the remaining categories. Woodbridge's affidavit also states that Stadin's proposed resolution had been sub-

mitted initially to the Securities and Exchange Commission which advised that "it would not take any action if the management should omit the proposal from the proxy statement"; that he is not on unfriendly terms with Stadin; and that their relationship is so remote that he cannot be described as either friendly or unfriendly.

Stadin thereafter also filed an affidavit. In it he states that he is an attorney; that at the 1961 meeting two shareholders expressed opposition to his resolution because bringing suit would be wasting money; that Union's president then said that suits would cut into research and developmental programs of suppliers and would be detrimental to the industry of which Union was a member; that the shareholders were not advised that the resolution was not a proper one for shareholder action under Missouri law; that he was not on friendly terms with Woodbridge; that "My feeling about him, not his about me, is what counts"; that he is not satisfied with Woodbridge; that Woodbridge represents his own interests and the interests of management and does not represent the interests of Union's shareholders; that in his opinion it would be more efficient and more effective if Union filed its suits by defendants rather than by items of equipment; that intervention would result in no confusion, complexity or delay but denial of intervention would; and that if intervention is granted he would allocate his claims among the existing suits so that there would be no duplication of claims being sued upon.

Stadin also testified at the hearing on the motions to intervene. His testimony there was simply that the recitals in his complaint and affidavit were true. No cross-examination was undertaken and there was no further testimony.

A second affidavit from Woodbridge was then filed. This incorporated those parts of the transcript of the 1961

shareholders' meeting which included the comments of the two shareholders and the responsive remarks of Union's president. Stadin then filed another affidavit asserting that the statements made at the meeting were not under oath and were hearsay.

It is in this state of the record that the appeal comes to us.

Stadin's argument here, as we read his briefs, is that the conditions for his intervention as a matter of right under Rule 24(a)(2) have been met and the denial of intervention is reversible error; that the conditions for his permissive intervention under Rule 24(b)(2) have also been met and the denial of intervention is an abuse of discretion; that the recent case of *Rogers* v. *American Can Co.*, 3 Cir., 1962, 305 F.2d 297, is authority for the right of a minority shareholder, in the face of a contrary vote by the majority, to institute a shareholders' derivative suit for threefold damages under the Clayton Act; and that the *Rogers* case governs the present appeal.

One point must preliminarily be made. In *Kozak* v. *Wells*, 8 Cir., 1960, 278 F.2d 104, 109, this court said that, for purposes of judging the satisfaction of the conditions for intervention of right,

> "[W]e look to the pleadings, that is, to the motion for leave to intervene and to the proposed complaint or defense in intervention, and, absent sham and frivolity, we accept the allegations in those pleadings as true. * * * Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with ultimate results on the merits."

We cited, in support of this, *Otis Elevator Co.* v. *Standard Constr. Co.*, D.Minn., 1950, 10 F.R.D. 404, 406; *Kaufman* v. *Wolfson*, S.D. N.Y., 1956, 137 F.Supp. 479, 481;

Clark v. *Sandusky*, 7 Cir., 1953, 205 F.2d 915, 918; and *Dalva* v. *Bailey*, S.D. N.Y., 1957, 158 F.Supp. 204, 207.

Our quoted language, however, does not mean that, for the purposes described, all statements in pleadings of this kind are to be accepted as true irrespective of their nature or content. The situation is somewhat akin to that presented on a motion for summary judgment or on a motion to dismiss, namely, that only matters well pleaded (as the *Otis* and *Clark* opinions specifically state) are entitled to the preferential status of assumed truth. Conclusory statements are not. See 4 Moore's Federal Practice § 24.14; *Pacific States Box & Basket Co.* v. *White*, 1935, 296 U.S. 176, 185; *Straus* v. *Foxworth*, 1913, 231 U.S. 162, 168; *Dyer* v. *Gallagher*, 6 Cir., 1953, 203 F.2d 477, 479. Further, our language does not imply that the district court and this court may not consider allegations in pleadings and affidavits of the opponents to intervention to the extent that they, too, are well pleaded and supply uncontroverted and material facts. When so limited, this is not trial by affidavit. Stadin in effect acknowledges this by indulging in the filing of his own responsive affidavit.

We make the following observations:

a. What Stadin seeks is the institution of litigation in the eleven remaining categories of equipment. He would accomplish this by the addition, through intervention, of new causes of action in the two pending suits.[5] This is in contrast with the more common situation where intervention is sought on existing counts.

b. Stadin makes no attempt to intervene in the turbine-generator and meters categories as such. As to these he makes no request for additional relief and does not even

[5] See as to this, under Rule 24(b), *Kind* v. *Markham*, S.D. N.Y., 1945, 7 F.R.D. 265, 266; *Owen* v. *Paramount Productions*, S.D. Cal. 1941, 41 F. Supp. 557, 561.

reiterate the prayers which Union embodies in its complaints. Considering these two categories alone and isolatedly, Stadin thus makes no claim of inadequate representation or of possible binding effect of judgments and could be regarded as being satisfied with Union's representation there.

c. Stadin's claim of possible binding effect of judgments to be rendered in the turbine-generator and meters issues then comes down to nothing more than an argument that adverse judgments in these categories will have, by reason of their precedential status, a serious and untoward effect in the others.

d. Stadin's claim of inadequate representation comes down to assertions that Union, by not having instituted litigation in the remaining categories, is not even representing itself and thus is not representing Stadin at all; that absence of representation does not constitute adequate representation; that Woodbridge does not and cannot adequately represent Stadin; and that separation of suits by defendants rather than by equipment categories is more effective.

With these observations the insufficient character of Stadin's posture for intervention in these actions becomes apparent.

1. *Intervention of right—the effect of the judgment* That an applicant for intervention of right under Rule 24(a)(2) "is or may be bound by a judgment in the action" is an obvious prerequisite. This is apparent from the very language of the Rule. We have heretofore so held. *Kozak* v. *Wells*, supra, pp. 108-9 of 278 F.2d; *Pennington* v. *Missouri Pac. R. R.*, 8 Cir., 1956, 239 F.2d 332, 334.

Stadin's complaints in intervention reflect that the thirteen categories, that is, turbine-generators, meters, and the eleven not sued, concern different kinds of equipment.

The complaints assert, either directly or through their incorporation of the allegations of the main complaints, that each defendant pleaded guilty or nolo contendere, as the case may be, as to the respective categories. All this is a demonstration on the face of Stadin's pleadings alone that the issues are several in number and are varied as to factual background. This casts doubt on any claim that a judgment in one category will possibly operate with binding effect in another. But in his brief Stadin asserts, "If defendants successfully defended in the main cases appellant would have great difficulty in independently establishing their liability on his claims". This, as we have noted, is Stadin's basic argument on the effect-of-the-judgment feature.

We had occasion in *Kozak* v. *Wells*, supra, to consider the significance of the language in Rule 24(a)(2). We there concluded, pp. 110-11 of 278 F.2d, that we preferred to give the word "bound" a utilitarian and realistic interpretation and not a narrow one, that the words "may be" in the Rule indicate the judgment need not always operate as res judicata, that the Rule generally was to be given a liberal interpretation, and that "perhaps each case is to be decided and explained largely on its own facts". Cf. *International Mortgage & Investment Corp.* v. *Von Clemm*, 2 Cir., 1962, 301 F.2d 857, 861-62.

Liberality, however, does not equate with rights of indiscriminate intervention. The applicant must still meet the requirement that he "is or may be bound" by the judgments. The consequences of adverse judgments in the main actions are not nearly so evident here as they were in *Kozak* v. *Wells*, with the presence of factors (legal effectiveness of attacks against a state court order and judgment; existence and propriety of the defendants' acts) which we there specifically pointed out. Here there is only "great difficulty". The Supreme Court, in a case decided since *Kozak* v. *Wells*, has stated:

> "Second, appellants argue that even should they not be legally precluded from bringing a private action, nevertheless the very existence of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree. * * * [T]here is considerable weight to the argument that the court would feel constrained as a matter of comity at least to build on the foundations of the present decree. * * * However, it is abundantly clear that this effect is not at all the equivalent of being legally bound, which is what must be made out before a party may intervene as of right." *Sam Fox Publishing Co. v. United States*, 1961, 366 U.S. 683, 694.

The presence or possibility of difficulty, even great difficulty, is not enough.

2. *Intervention of right—adequacy of representation.* That representation of the intervention applicant's interest "by existing parties is or may be inadequate" is another obvious prerequisite for intervention of right under Rule 24(a)(2). This also is apparent from the very language of the Rule. Again, we have heretofore so held. *Kozak* v. *Wells*, supra, pp. 108-09 of 278 F.2d; *Pennington* v. *Missouri Pac. R. R.*, supra, p. 334 of 239 F.2d. If the representation "may be" inadequate, that itself is enough. *Ford Motor Co.* v. *Bisanz Bros.*, 8 Cir., 1957, 249 F.2d 22, 28.

The representation, the adequacy of which is to be determined here, is that of Union viz-a-viz the interest of Stadin as a shareholder of Union. Two leading commentators on federal practice have said that inadequacy of representation is or may be shown by proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervener, or by the failure of the representative in

the fulfillment of his duty. 4 Moore's Federal Practice § 24.08, pp. 38-39; 2 Barron & Holtzoff, Federal Practice and Procedure (Wright Revision), § 597, pp. 381-82. See also *Farmland Irrigation Co.* v. *Dopplmaier*, 9 Cir., 1955, 220 F.2d 247, 248-49; *Bisanz Bros.* v. *Chicago-Milwaukee-St. Paul & P. R. R.*, D. Minn., 1957, 20 F.R.D. 353, 354, vacated on other grounds, *Ford Motor Co.* v. *Bisanz Bros.*, supra, 249 F.2d 22; *S. C. Johnson & Son* v. *Boe*, E.D. Pa., 1960, 187 F.Supp. 517, 519; *Kind* v. *Markham*, supra, S.D. N.Y., 1945, 7 F.R.D. 265, 266.

The allegations in Stadin's pleadings embrace no charge of collusion; they speak of management's voting against the Stadin resolution and they charge that this bespeaks condonation and bad faith. These latter characterizations are only the pleader's conclusions. *Billings Utility Co.* v. *Advisory Committee, Board of Governors*, 8 Cir., 1943, 135 F.2d 108, 112; *Marranzano* v. *Riggs Nat'l. Bank*, D.C. Cir., 1950, 184 F.2d 349, 351.

Neither do we find anything of substance in Stadin's pleadings as to Union's having an adverse interest to that of Stadin. The claimed adversity centers in Woodbridge and in the allegations that he "is not on friendly terms with" Stadin; that he "voted against bringing the main action"; that he stands charged by Stadin before the S.E.C.; and that he called that charge malicious. These, however, do not equate with Union's having an interest adverse to Stadin. Furthermore, we fail to see the relevancy on this issue of the allegations as to the short swing profits, the charge of malice, and the lack of friendliness to Stadin. The allegation that Woodbridge voted against the main actions is an obvious over-interpretation of his vote against the Stadin resolution and, in any event, is largely disproved by Woodbridge's having signed the complaint as one of the attorneys for Union in each main action. Woodbridge is only one of several counsel for

Union. It is unrealistic and too much to demand that each lawyer for a corporation be on affirmatively friendly terms with each shareholder. We cannot escape the conclusion that Stadin's complaint as to inadequacy of representation lies largely in the area of asserted disagreement between lawyers as to how litigation should be conducted. Mere difference of opinion among attorneys is not of itself inadequate representation within the meaning of the Rule. If it were, intervention of right would become almost automatic.

Finally, we see no failure of Union as yet in the fulfillment of its duty. There is nothing along this line charged here with respect to the main claims. Nonfeasance, if it exists, is asserted as to the categories not sued upon. What we say below with respect to Union's refusal to act is equally pertinent here. Union must be given a reasonable opportunity to act before nonfeasance or neglect of duty within the concept of inadequate representation appears from the pleadings.

On the factor of unfriendliness of counsel our attention is called, with emphasis, to *United States* v. *C. M. Lane Lifeboat Co.*, E.D. N.Y., 1938, 25 F.Supp. 410. This was an action by the government to recover, from its supplier and the latter's performance bond surety, damages which the government had been compelled to pay for infringement of a patent embodied in the goods supplied. An officer of the supplier sought to intervene. He alleged that he and another officer, as a condition precedent to the surety's issuance of the bond, executed an indemnity agreement in favor of the surety. The petition to intervene disclosed that the supplier and the surety retained the same attorney and alleged that the intervener and that attorney were not on friendly terms. The court observed that any judgment rendered against the surety would enable it to proceed against the intervener in-

demnitor and that the judgment, though not directly binding the intervener, would do so indirectly. This is the heart and the significance of the case. The court did go on to observe, p. 411 of 25 F.Supp.,

> "Then too, there is something to be said as to the adequacy of the representation of his interest. He says that he is not on friendly terms with the attorney who in effect is representing his interest."

This, it seems to us, is no more than an embellishment upon the basic holding that it was the contingent liability of the intervener which warranted intervention.

We recognize that the *Lifeboat* case has been said to be authority for intervention based upon unfriendliness of counsel of record. See, for example, 2 Barron & Holtzoff, Federal Practice and Procedure (Wright Revision), § 597, p. 381, and *Farmland Irrigation Co.* v. *Dopplmaier*, supra, p. 249 of 220 F.2d. These are mere references, however, and we suspect they overstate the authority of the *Lifeboat* case.

We therefore conclude that there is not enough here to demonstrate either the possible binding effect of judgments in the main actions or the possible inadequacy of representation and that Stadin is not entitled to intervention of right.

3. *Permissive intervention.* Having reached this conclusion as to intervention of right we need not tarry long with the district court's denial of permissive intervention under Rule 24(b)(2). It has been indicated that an order denying permissive intervention is not appealable unless there is abuse of discretion. *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. R.*, 1947, 331 U.S. 519, 524-5. This court has commented upon this approach in *Pennington* v. *Missouri Pac. R.R.*, supra, p. 335 of 239 F. 2d, and particularly in *Ford Motor Co.* v. *Bisanz Bros.*,

supra, pp. 26-27 of 249 F.2d. In any event, the Rule itself directs that in the exercise of its discretion the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties".

It seems unquestionably clear to us from the pleadings of the intervener that his desired incorporation in the main actions of the several additional equipment categories will bring into these lawsuits added complexity; the inevitable problems attendant upon additional witnesses, interrogatories and depositions; expanded pretrial activity; greater length of trial; and elements of confusion. These in themselves suggest delay and the clouding of the issues involved in the original causes of action. More than one trial court has observed that "Additional parties always take additional time" and that "they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair". *Crosby Steam Gauge & Valve Co.* v. *Manning, Maxwell & Moore*, D. Mass., 1943, 51 F.Supp. 972, 973; *First Congressional Church, etc.* v. *Evangelical and Reformed Church*, S.D. N.Y., 1958, 21 F.R.D. 325, 327-8; *Wilson* v. *Illinois Central R.R.*, N.D. Ill., 1957, 21 F.R.D. 588, 589.

We cannot hold that the district court's denial of permissive intervention here was an abuse of the discretion possessed by the court under Rule 24(b)(2). Compare *Sutphen Estates* v. *United States*, 1951, 342 U.S. 19, 23.

4. *The derivative action aspects.* Stadin in his briefs has characterized his motions to intervene as class motions filed, under Rule 23(b), F.R.Cv.P., to enforce shareholders' secondary rights. We need not pass upon the narrow procedural question whether a derivative action may properly be instituted through the device of intervention. We assume for present purposes that it may. But, having

made that assumption, we fail to find upon this record that Stadin has met the conditions required for a federal derivative suit.

These conditions are several in number but Rule 23(b) itself clearly embraces four which are applicable to the situation here: (a) that the corporation possess rights which it may properly assert and enforce; (b) that the plaintiff shareholder make a demand upon the corporation to enforce those rights; (c) that the corporation refuses so to do; and (d) that the plaintiff's complaints set forth with particularity his efforts to secure corporate action and the reasons for his failure so to obtain such action or for not making such effort. See *Quirke* v. *St. Louis-San Francisco Ry.*, 8 Cir., 1960, 277 F.2d 705, 707-08, cert. den. 363 U.S. 845, and 13 Fletcher, *Private Corporations* (1961 Revision) §§ 5970, 6008. A fifth condition, which Stadin in his brief concedes still to be "the sine qua non of the stockholder's derivative right to sue", is that management be guilty of conduct equivalent to bad faith or breach of trust. *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 1917, 244 U.S. 261, 263-64; *Ashwander* v. *Tennessee Valley Authority*, 1936, 297 U.S. 288, 319, 343; *Hawes* v. *Oakland*, 1881, 104 U.S. 450, 460-61; *Heinz* v. *National Bank of Commerce*, 8 Cir., 1916, 237 F. 942, 948-49. Otherwise management possesses a wide discretion in determining a corporation's business policies and the methods of executing them. This discretion extends to litigation and to a decision to sue or not to sue. *Merrill* v. *Davis*, 1950, 359 Mo. 1191, 225 S.W.2d 763, 768. See *Swanson* v. *Traer*, 7 Cir., 1957, 249 F.2d 854, 858-9. It extends even to the settling of an antitrust claim. *Post* v. *Buck's Stove & Range Co.*, 8 Cir., 1912, 200 F. 918, 920. See *Sam Fox Publishing Co.* v. *United States*, supra, p. 689 of 366 U.S.

The demand Stadin made was that a resolution be adopted that Union take "appropriate steps in pursuit of

all its legal rights" against the convicted suppliers so as to achieve reimbursement for the price differentials. This was followed by a statement that if Union did not undertake to pursue those rights Stadin himself would seek a legal remedy. An outright demand to take "appropriate steps" is not necessarily equivalent to a demand that Union institute suit for the remaining categories. The term "appropriate steps" is broad and, although it is channeled here to Clayton Act threefold damages, it may well embrace steps which are short of actual suit. It may include investigation, the determination whether rights of action exist at all, negotiations, settlement and, under appropriate circumstances, even a decision not to sue. Furthermore, Union's refusal to comply with any demand to sue is not apparent. The shareholders did reject the resolution and to that extent refused to comply with the proposal from Stadin. But litigation was subsequently instituted as to eight categories. And we cannot conclude that the absence of litigation as to the remaining categories up to the time of the filing of the motions to intervene constitutes a positive and unwarranted refusal.

Finally, we find nothing in the pleadings which qualifies as a breach of trust or the like as required by *United Copper* and other cases cited above. Stadin's claims are (a) that the directors' opposition to his resolution was a vote against suing the defendants and (b) that the directors have condoned the sale of equipment in the other categories at rigged prices. We are not convinced that the directors' opposition to the resolution was a vote against suit. Time is necessary for the investigation, development and preparation of litigation. Suits in eight categories of equipment have already been instituted. The remaining categories are under investigation. This is not condonement or breach of trust.

Stadin presses upon us, however, the recent case of *Rogers* v. *American Can Co.*, supra, 3 Cir., 1962, 305 F.2d

297, where, despite a vote against the suit by a majority of a corporation's shareholders, it was held that a minority shareholder could maintain a Clayton Act treble damage action against the directors and the corporation's supplier. There, however, the plaintiff's charge was that his corporation was a captive through the conspiratorial activities of its controlling directors and a substantial shareholder and chief supplier. Under these circumstances, the court said, p. 317 of 305 F.2d:

> "The business judgment character of the stockholders' determination, generally effective to definitely terminate intracorporate controversies, must yield to the right of a minority stockholder to expose his charges of violations of positive law * * *."

Except in an extreme and unusual situation of that kind, we do not interpret *Rogers* as denying the authority of *United Copper* and its companion cases and, indeed, the language we have quoted so indicates. Neither do we regard the case as indicative of a new and nationwide public policy, as Stadin argues.

We find no comparable situation charged in the pleadings before us. There is no allegation that Union is in any way a captive or that its directors or management have engaged in conspiratorial activities with any of the convicted defendants. The remark of Union's president at the 1961 meeting to the general effect that treble damage suits could possibly weaken the whole group of suppliers so that it would affect adversely the industry's research hardly qualifies as a conspiratorial element. He named it as a worrisome fact and nothing more. The same is true as to the response of the president to the statements of the two shareholders. His remarks are only acknowledgments of the shareholders' comments and a statement of appreciation for them. They do not constitute, as Stadin would have us interpret them, expressions of interest "to

protect the price-fixers, and through them the 'industry', not Union's stockholders and consumers". What is charged here does not take these cases out of the general rule and into any area to which the *Rogers* case is conceivably applicable.

These Clayton Act cases which are arising out of the 1961 Philadelphia convictions will prove complicated enough in themselves. They will become much more complicated if shareholders are allowed to intervene upon showings of no more substance than is contained in Stadin's complaints here. As Mr. Justice Jackson said, dissenting in another context in *New Jersey* v. *New York*, 1953, 345 U.S. 369, 375, "it is generally bad policy to encumber any case with unnecessary intervenors".

Stadin, of course, presumably wants only that Union have adequate protection and representation and that it recover that which, if anything, is due from the suppliers and which may be obtained with a return, net, to the company. If this is fairly assured, intervention seems not to be warranted. On this record and at this time, we think there is fair assurance.

The district court's denials of the motions to intervene were not improper. So far as its order pertains to intervention under Rule 24(a)(2), it is affirmed. So far as it concerns intervention under Rule 24(b)(2), the appeal therefrom is dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.